APPENDIX A.

RAILWAY MAIL PAY ACT OF JULY 28, 1916

SEC. 5. That the Postmaster General is authorized and directed to readjust the compensation to be paid to railroad companies from and after the thirtieth day of June, nineteen hundred and sixteen, or as soon thereafter as may be practicable, for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and at the rates hereinafter provided. (28 U. S. C. 524)

The Postmaster General may state railroad mail routes and authorize mail service thereon of the following four classes, namely: Full railway post-office-car service, apartment railway post-office car service, storage-car service, and closed-pouch service. (28 U. S. C. 525)

Full railway post-office car mail service shall be service by cars forty feet or more in length, constructed, fitted up, and maintained for the distribution of mails on trains. The authorization of full railway post-office cars shall be for standard-size cars sixty feet in length, inside measurement, except as hereinafter provided. (28 U. S. C. 526)

Apartment railway post-office car mail service, shall be service by apartments less than forty feet in length in cars constructed, fitted up, and maintained for the distribution of mails on trains. Two standard sizes of apartment railway post-office cars may be authorized and paid for, namely, apartments fifteen feet and thirty feet in length, inside measurement, except as hereinafter provided. (28 U. S. C. 527)

* * * * * * *

Service by full and apartment railway post-office cars and storage cars shall include the carriage therein of all mail matter, equipment, and supplies for the mail service and the employees of the Postal Service or Post Office Department, as shall be directed by the Postmaster General to be so carried. (28 U. S. C. 529)

Closed-pouch mail service shall be the transportation and handling by railroad employees of mails on trains on which full or apartment railway post-office cars are not authorized, except as hereinbefore provided. The authorizations for closed-pouch service shall be for units of seven

feet and three feet in length, both sides of car. (28 U. S. C. 536)

* * * * * * *

Where authorizations are made for cars of the standard lengths of sixty, thirty, and fifteen feet, as provided by this section, and the railroad company is unable to furnish such cars of the length authorized, but furnishes cars of lesser length than those authorized, but which are determined by the department to be sufficient for the service, the Postmaster General may accept the same and pay only for the actual space furnished and used, the compensation to be not exceeding pro rata of that provided by this section for the standard length so authorized: *Provided*, That the Postmaster General may accept cars and apartments of greater length than those of the standard requested, but no compensation shall be allowed for such excess lengths. (28 U. S. C. 532)

* * * * * * *

In computing the car miles of the full railway post-office cars and apartment railway post-office cars, the maximum space authorized in either direction of a roundtrip car run shall be regarded as the space to be computed in both directions, unless otherwise mutually agreed upon. (28 U. S. C. 534)

The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates than those herein specified, and make report to Congress of all cases where such special contracts are made and the terms and reasons therefor. (28 U. S. C. 565)

All cars or parts of cars used for the Railway Mail Service shall be of such construction, style, length, and character, and furnished in such manner as shall be required by the Postmaster General, and shall be constructed, fitted up, maintained, heated, lighted, and cleaned by and at the expense of the railroad companies. No pay shall be allowed for service by any railway post office car which is not sound in material and construction and which is not equipped with sanitary drinking water containers and toilet facilities, nor unless such car is regularly and thoroughly cleaned. (28 U. S. C. 537)

* * * * * * *

Railroad companies carrying the mails shall furnish all necessary facilities for caring for and handling them while in their custody. They shall furnish all cars or parts of cars used in the transportation and distribution of the mails, except as herein otherwise provided, and place them in stations before the departure of trains at such times and when required to do so. They shall provide station space and rooms for handling, storing, and transfer of mails in transit, including the separation thereof, by packages for connecting lines, and such distribution of registered mail in transit as may be necessary, and for offices for the employees of the Railway Mail Service engaged in such station work when required by the Postmaster General, in which mail from station boxes may be distributed if it does not require additional space.

If any railroad company carrying the mails shall fail or refuse to provide cars or apartments in cars for distribution purposes when required by the Postmaster General, or shall fail or refuse to construct, fit up, maintain, heat, light, and clean such cars and provide such appliances for use in case of accident as may be required by the Postmaster General, it shall be fined such reasonable sum as may, in the discretion of the Postmaster General, be deemed proper. (28 U. S. C. 538)

The Postmaster General shall in all cases decide upon what trains and in what manner the mails shall be conveyed. Every railroad company carrying the mails shall carry on any train it operates, and with due speed, all mailable matter, equipment, and supplies directed to be carried thereon. If any such railroad company shall fail or refuse to transport the mails, equipment, and supplies when required by the Postmaster General on any train or trains it operates, such company shall be fined such reasonable amount as may, in the discretion of the Postmaster General, be deemed proper. (28 U. S. C. 539)

* * * * * *

All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith. (28 U. S. C. 541)

The Interstate Commerce Commission is hereby empowered and directed as soon as practicable to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same; and orders so made and published shall continue in force until changed by the commission after due notice and hearing. (28 U. S. C. 542)

* * * * * * *

The procedure for the ascertainment of said rates and compensation shall be as follows.

Within three months from and after the approval of this act, or as soon thereafter as may be practicable, the Postmaster General shall file with the commission a statement showing the transportation required of all railway common carriers, including the number, equipment, size, and construction of the cars necessary for the transaction of the business; the character and speed of the trains which are to carry the various kinds of mails; the service, both terminal and en route, which the carriers are to render; and all other information which may be material to the inquiry, but such other information may be filed at any time in the discretion of the commission. (28 U. S. C. 545)

* * * * * * *

All the provisions of the law for taking testimony, securing evidence, penalties, and procedure are hereby made applicable. (28 U. S. C. 548)

For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification. (28 U. S. C. 549)

Pending such hearings and the final determination of the question, if the Interstate Commerce Commission shall determine that it is necessary or advisable, in order to carry out the provisions of this section, to have additional and more frequent weighing of the mails for statistical purposes, the Postmaster General, upon request of the commis-

sion, shall provide therefor in the manner now prescribed by law, but such weighing need not be for more than thirty days. (28 U. S. C. 550)

At the conclusion of the hearing the Commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the service connected therewith and during the continuance of the order the Postmaster General shall pay the carrier from the appropriation herein made such rate or compensation. (28 U. S. C. 551)

Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a re-examination, and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein. (28 U. S. C. 553) (Italics supplied)

For the purposes of this section the Interstate Commerce Commission is hereby vested with all the powers which it is now authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers. (28 U. S. C. 554)

* * * * * * *

That it shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General so to do, and for such offense shall be fined $1,000. Each day of refusal shall constitute a separate offense. (28 U. S. C. 563)

APPENDIX B.

OPINIONS AND DECREES OF THE THREE JUDGE UNITED STATES DISTRICT COURT FOR THE AUGUSTA DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA

(Copied from Plaintiffs' Exhibit 1, the said Exhibit being the transcript of record, Supreme Court of the United States, October Term, 1937 No. 63, the United States of America and Interstate Commerce Commission vs. W. V. Griffin and H. W. Purvis, Receivers for Georgia & Florida Railroad, Appeal from the District Court of the United States for the Southern District of Georgia.)

OPINION AND DECREE—Filed January 23, 1935 (Trans. in No. 63 (1937) R. 29)

IN UNITED STATES DISTRICT COURT

In Equity, No. 207

W. V. GRIFFIN and H. W. PURVIS, Receivers for Georgia & Florida Railroad, Petitioners

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

OPINION AND DECREE—Filed January 23, 1935

This is a suit by W. V. Griffin and H. W. Purvis, Receivers of the Georgia & Florida Railroad, against the United States of America and the Interstate Commerce Commission to enjoin, set aside, amend, and suspend an order of such Commission of May 10, 1933, denying an application for increased compensation for the transportation of mail. The suit is brought under U. S. C. A. Title 28, Sections 41 (27 and 28) and 43-48.

No other facts were established or sought to be established than those set forth in such order of said Commission, a copy of which is annexed to petitioners' complaint, and it is therefore considered unnecessary and redundant to restate "Findings of Fact" as provided by Equity Rule 70½. The challenge is to the conclusion drawn from undisputed facts.

The facts developed in the "cost study" fully set forth in such order of the Commission were ascertained by the

application of rules prescribed by the Commission. All parties to this controversy agree that a "cost study" is not and cannot be mathematically correct but is an approximation. Such "cost study" discloses among other facts that "There was (1) a deficit in net railway operating income from mail of $4,945,080 based upon 1[illegible] operations". It further disclosed that as regards re[illegible]e: "The distribution of expense upon the space-ratios shows that the ratio for mail service was 102.79" or that for every dollar applicants received for transporting mails they expended one dollar and 2.79 cents.

The fact that this railroad lost more money on other services rendered by it or that other railroads transported mail under similar, if not identical conditions, at a profit or that this railroad belonged in a certain classification established by such Commission, known as Class 1 railroads and that therefore it should be in accord with other railroads of such Class as to compensation as to mail, do not refute or impair the fact that the compensation allowed this railroad for the transportation of mail does not equal the cost of so doing. (Italics supplied)

While it is true that "For the purpose of determining and fixing rates or compensation hereunder the Commission is authorized to make such classification of carriers as may be just and reasonable and * * * fix general rates applicable to all carriers in the same classification", it can fix such rates only "Where just and equitable". 39 U. S. C. A., Section 549.

The transportation of mail by railroads is compulsory but they are "entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith." 39 U. S. C. A., Section 541.

There is no attack upon the efficiency of the operation of this railroad. There is no charge of extravagance. The bald fact remains that this railroad is required in order to escape severe punishment (39 U. S. C. A., Section 563) to transport mail at a compensation fixed by such Commission and that such compensation does not pay the actual cost of service. *This compensation is not in compliance with the duty on the United States to pay "fair and reasonable compensation" and is not "just and equitable".* (Italics supplied)

It is therefore ordered and decreed:

(1) That said order of the Interstate Commerce Commission of May 10, 1933, is and has at all times been unlawful and that said order be set aside and annulled.

(2) Said Commission shall take such further action in the premises as the law requires in view of the annulment and setting aside of the said order of May 10, 1933.

Inasmuch as this court has not the authority to fix the compensation we do not deal with the question of what per cent of return on the investment, if any, would be required to make the compensation fair and reasonable.

This 18th day of January, 1935.

SAMUEL H. SIBLEY,
United States Circuit Judge.
WM. H. BARRETT,
United States District Judge.
E. MARVIN UNDERWOOD,
United States District Judge.

[File endorsement omitted.]

OPINION AND DECREE—Filed February 23, 1937 (Trans. in No. 63 (1937) R. 55)

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION

In Equity, No. 228

W. V. GRIFFIN and H. W. PURVIS, Receivers for Georgia & Florida Railroad

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

OPINION AND DECREE—Filed February 23, 1937

Effective August 1, 1928, the Interstate Commerce Commission (hereinafter called Commission), in Railway Mail Pay, 144 I. C. C. 675, established rates for transportation of mail by railroads over 100 miles in length and these rates were applied to the Georgia & Florida Railroad. There

after the receivers of such railroad made application to the Commission for an alteration of such rates so that they would be fair and reasonable for such railroad. After a test period, investigation and hearing from counsel for applicant and for the Postmaster General the Commission on May 10, 1933, declined to change the rates.

The receivers of such railroad then brought their petition before a Three-Judge Court against the United States of America and against said Commission, praying that said order of May 10, 1933, be declared unlawful and wholly void and that such Commission reopen and reconsider the proceedings and "determine the fair and reasonable rates to be received by petitioners for transportation of the mails, on and after said April 1, 1931".

"No other facts were established or sought to be established than those set forth in said order of said Commission, a copy of which is annexed to petitioners' complaint". "The challenge is to the conclusion drawn from the undisputed facts." (Previous decision of this court.) The court therefore deemed it unnecessary to state "Findings of Fact"; but its judgment did declare certain facts as follows:

"(1) The facts developed in the 'cost study' fully set forth in such order of the Commission were ascertained by the application of rules prescribed by the Commission.

"(2) All parties to this controversy agree that a 'cost study' is not and cannot be mathematically correct but is an approximation.

"(3) 'The distribution of expense upon the space ratios shows that the ratio for mail service was 102.79' or that for every dollar applicants received for transporting mails they expended one dollar and 2.79 cents.

"(4) *The fact that this railroad lost more money on other services rendered by it or that other railroads transported mail under similar, if not identical, conditions at a profit or that this railroad belonged in a certain classification established by such Commission, known as Class 1 railroads, and that therefore it should be in accord with other railroads of such class as to compensation as to mail, do not refute or impair the fact that the compensation allowed this railroad for the transportation of mail does*

not equal the cost of so doing. The Commission can fix such rates only "Where just and equitable." (Italics supplied)

"(5) The transportation of mail by railroads is compulsory but they are 'entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.'

"(6) There is no attack upon the efficiency of the operation of this railroad. There is no charge of extravagance."

The said order was annulled and the Commission was directed to take such further action as the law requires. There was no appeal from this decision.

Thereafter the Commission of its own motion reopened such proceeding, which resulted in a report on February 4, 1936, again establishing the same rates which this court had declared unlawful.

It becomes important to ascertain what, if any, additional testimony, or what, if any, different rules of law warranted such conclusion.

For the reason that neither report states definitely "Findings of Fact" as such it is not easy to ascertain what different facts existed at the different hearings. We will do our best to ascertain the differences in facts and in rules of law following the course of discussion in the last report.

The report, after quoting from brief of applicant, states:

"There is implicit in the statement quoted, and in the corresponding portion of the opinion referred to, the assumption that if the department discontinues mail service on applicant's trains the applicant will thereby be saved the expenditures of $1.0279 for every dollar of revenue it thus loses."

We do not concur in this statement. The opinion definitely states that these figures were derived by "the distribution of expense upon the space ratios" and by the employment of methods approved or directed by the Commission. However, we deem this difference in interpretation immaterial.

The argument of the Commission to destroy the effect of its methods previously used is thus stated: (Italics supplied)

"* * * Relative costs derived from a series of studies of expenditures for operations common to a number of

services cannot be converted into absolute costs by using a single figure relation derived from such studies.

"The cost computed in the manner described is a hypothetical cost and not an actual cost, and is not necessarily conclusive as applicant contends. In other mail-pay proceedings, in which space authorized and paid for was found to be the space that should be charged to mail in cost studies similar to that here, consideration was given to other factors as well, such as the amount and character of the unused space reported as operated (Railway Mail Pay, 85 I. C. C. 157, 170; 123 I. C. C. 33, 39); the actual space occupied by mail, as distinguished from authorized space, determined by the mail load carried, based upon a count of bags and of packages outside of bags, and, in some instances, by the weight (Railway Mail Pay, 95, I. C. C. 493, 500, 511; 120 I. C. C. 439, 446); comparisons with compensation received from other services in passenger-train cars (Railway Mail Pay, 144 I. C. C. 675, 706); comparisons with freight rates (Railway Mail Pay, 144 I. C. C. 675, 705; 151 I. C. C. 734, 742); comparisons per car-mile and per car-foot miles of the computed cost of mail service and the revenue from authorized mail service with the computed cost of corresponding units in passenger-train service as a whole (Railway Mail Pay, 144, I. C. C. 675, 699); and the character of the service performed in connection with transporting the mail (Railway Mail Pay, 56 I. C. C. 1, 8; Electric Railway Mail Pay, 58 I. C. C. 455, 464; 98 I. C. C. 737, 755)."

Neither applicant nor this Court entertains the view that the hypothetical cost is "necessarily conclusive". It is merely the fairest method that has been devised. If "actual cost" as to each item be required applicants would be helpless and the Commission would be reduced to guessing. What elements may have been considered here, and should not be in the absence of supporting testimony and some indication as to what weight was given each element. Furthere, there is no testimony here as to "unused space reported as operated." There is included payment for unused space not operated, of which more later. There is nothing to justify disregard of the fact used in the first report that "space authorized for mail is regarded as space used." (Italics supplied)

The law as established in this case by the previous decision, unreversed, makes inapplicable "comparisons with compensation received from other services in passenger train cars"; "Comparisons with freight rates"; and "comparisons per car-mile and per car-foot mile of the computed cost of mail service and the revenue from authorized mail service with the computed cost of corresponding units in passenger-train service as a whole."

There is no criticism of "the character of the service performed in connection with transporting the mail."

Further argument of the Commission, as we understand it, is that because 30 feet instead of 15 feet is partitioned off for mail this adds 15 feet to the unused space for which the post office department pays a part. We do not so understand the testimony. Our understanding is that the unused space is the same wherever the partition be placed.

There is however this further finding of fact implied, though not definitely stated, viz: that an unnecessarily large car is used and this adds to the portion paid by the mail for unused space and that if 15 feet were eliminated from the car the mail space ratio would be reduced to 10.79 per cent, resulting in a profit to applicant from mail of $1,711.

Lengthily are theories and possibilities advanced to establish that a different result might be reached if different methods were employed "to ascertain and compute the proportions of operating expense and the separations into expenses for freight service and passenger service respectively", but there is no justification submitted for abandoning the method employed in making the first report, which was unchallenged as to accuracy and was admitted to have been apportioned "in accordance with the formulas prescribed for Class 1 roads for the separation of expenses between freight and passenger service." (Italics supplied)

The second report not only does not contradict this but reaffirms it in this language: "The methods are the same as those prescribed in our rules governing separation of such expenses on large steam railroads."

We find nothing that warrants any change in our conclusions as to the legality of the order now before us from our previous conclusion as to the same rates except the fact, stated by implication, that the use of a mixed car shorter by 15 feet would result in a profit from mail reve-

rate of $1.711 annually. The report discloses "The total mail service investment thus derived was $457,082." This return is approximately .0037 per cent. This is not "fair and reasonable."

Inasmuch as all the facts constituting the basis for the order of the Commission are fully set out in the report, it is deemed unnecessary to restate them in this opinion as findings of fact, it is therefore ordered and decreed:

(1) That said order of the Interstate Commerce Commission of February 4, 1936, is and has at all times been unlawful and that said order be set aside and annulled.

(2) Said Commission shall take such further action in the premises as the law requires in view of the annulment and setting aside of the said order of February 4, 1936.

This 22nd day of February, 1937.

SAMUEL H. SIBLEY,
United States Circuit Judge.
WM. H. BARRETT,
United States District Judge.
E. MARVIN UNDERWOOD,
United States District Judge.

[File endorsement omitted.]

APPENDIX C.

ARGUMENT IN REFUTATION OF MANY OF THE DEFENDANT'S MISCONCEPTIONS IN ITS REPRESENTATION OF THE FACTS IN THE CASE.

Since it had its days in the trial court, and failed to challenge any of that Court's special findings of fact, it hardly seems proper that the defendant should now portray *matters of fact* inconsistently with the findings of the lower Court; or that this Court should be called upon to consider irrelevancies, and ex parte versions of fact as though they were important in connection with specifications of error *on the law*.

In any event, in the interest of fair play, the plaintiff respectfully submits the following refutations to the defendant's representations as to what were "the circumstances in the present case", and "the facts as found by the Interstate Commerce Commission". One of the most striking examples of the tactic to which the plaintiff objects has already been described at page , supra. Other instances are: On page 5 the defendant states, as though it was significant, that the orders given to the plaintiff as of August 1, 1928, for service at rates prescribed by the Commission in its decision of July 10, 1928, *were accepted without protest until April 1, 1931* when they applied to the Commission for a re-examination.

Since the claim here involved begins from and after April 1, 1931, it is obviously immaterial whether or not there was any protest prior to that time. However, the fact is that the plaintiff did, before April 1, 1931 make a serious effort to obtain just compensation, but was defeated then by the policy of the Post Office Department and the Commission of arbitrarily grouping the respondent with lines of more than 100 miles in length, as a class. Finding 13 refers to the defeat of that effort as follows:

> "A group of associated short lines presented separate data relating to the short lines represented by

the group. It represented also the Georgia & Florida Railroad, whose total mileage exceeded 100 miles and which was a Class 1 railroad by virtue of its operating revenues. The Commission made no special provision for the Georgia & Florida Railroad in its findings, and did not classify it among the short line railroads. In the application of the order, the Post Office Department included plaintiffs' railroad in the increase of 15 per cent." (R. 21).

The significance of the date of April 1 1931 is merely that it was the date when respondent (after waiting to a time when no other mail pay case was pending) filed its own entirely separate application for re-examination, in the hope that it would thereby force the Commission to a separate determination of just compensation on its own individual merits and, as was expressly provided for in the Railway Mail Pay Act (28 U. S. C. 553).

Also, on page 5 the defendant injects the bare statement without anything more to support it, or to explain its significance, if any, "that there is no showing that the railroad ever applied to the Post Office Department for contract rates higher than those prescribed by the Commission". However, in its petition for writ the defendant included as one of the questions presented, the contention that the plaintiff had failed to exhaust its administrative remedies by not requesting the Postmaster General for a special contract, hence the following should be said.

In its answer in opposition to the defendant's petition for writ, the plaintiff pointed out that whether or not the plaintiffs did or did not ask the Postmaster General for a special contract is not a matter of definite record (R. 134); the only witness who referred to the possibility of such a special contract was General Superintendent Hardy, who did not take that office until May 1, 1939 (R. 129); and the most he could say was that *so far as he knew* the plaintiffs

had never applied to the Postmaster General for a special contract, but that he did not know that the plaintiffs had never done so (R. 101). Furthermore, the witness could point to only a very limited number of instances where such contracts had been made and then only under special circumstances not existing in this instance (R. 101, 135). Furthermore, that it was, and is, a matter of common knowledge that it was the policy of the Post Office Department to narrowly restrict special contracts to only a very few instances where a carrier traversed a difficult mountain terrain, such as the Rocky Mountains and the Ozark Mountains in Arkansas and Missouri; and in Alaska, and under the Hudson River through tunnels (R. 155). In any event, the authority to the Post Office Department to make special contracts was made to rest wholly in the discretion of the Post Office Department, and laid no correlative duty upon and created and raised no enforceable right for a carrier.

Furthermore the authority for the Postmaster General to enter into a special contract necessarily speaks for the future, and not for the past, hence a special contract could not be a remedy for any of the period prior to the decision of the Supreme Court on Feb. 28, 1938; and, also, even if the authority given by the law to the Postmaster General to make special contracts could possibly be construed as giving a carrier an enforceable remedy, there is no rule which requires a carrier to seek that remedy when it has elected to pursue the particular remedy more expressly provided by the law. Certainly, there is no claim that the Postmaster General, well knowing that the carrier was justly seeking, and in need of, the relief sought, ever made any offer of a special contract.

On page 7 the defendant represents that "The railroad's claim to higher rates was based entirely on the results obtained by application of this formula".

That statement is not correct. There was other evidence of a corroborating nature, but it is true to say that both the Post Office Department and the plaintiff placed their factual reliance upon the results of an agreed upon joint cost study. That cost study was made in the usual and customary manner, upon principles approved by the Commission; and the fact that that cost study showed, and the Commission found, that an increase of 87.4% was thereby indicated to be needed, is not disputed. The plaintiff does rely in large part upon that evidence, and the result thereof as found by the Commission.

On page 8 the defendant refers to the 3-foot closed pouch service as permitting the transportation of 50 to 56 pouches, but that the number actually carried was less than 50. That is not a candid statement because, in the first place, minimum space units are not ordered upon any theory of maximum use thereof. A three-foot closed pouch unit is simply the smallest unit of space which can be authorized when any transportation service at all is requisitioned. That minimum was set by the Commission with full appreciation of the fact that in few, if any, instances would the actual service ever be exactly equal to the maximum capacity limit—beyond which the Post Office Department would have to make an authorization for a larger unit of space. Nor is that condition peculiar to minimum 3-foot units. Pay for a 7-foot unit is required whenever the 3-foot maximum of 56 sacks or the equivalent is exceeded, although the excess might not be more than 5 sacks, and so on up the scale. (Finding 21, R. 27).

In the second place, though the minimum unit is for a *theoretical* three linear feet of car space, much more than three linear feet of floor space is *actually* required by the nature of the service. In other words, in theory as many as 56 sacks and packages, *if racked up and piled six feet*,

high, could be crammed into three linear feet, but that *theory* does not square with the actualities, viz., a 3-foot closed pouch requisition requires plaintiff's train employees to take on and put off mail sacks and packages at the beginning and at the end of each trip, and at every intermediate post office station; and to care for the same in transit. Because of the necessity for this constant handling of sacks and packages in and out of cars enroute, the mail cannot be stacked vertically to the *theoretical* height of six feet. For prompt handling it must *actually* be spread out over a much greater area of floor space. That fact largely explains why the Post Office Department has always preferred to use *the space authorized* as being equivalent to *the space used*.

In the third place, the proportion of 3-foot closed pouch service to R.P.O. service is small, representing in revenue from mail service only 11.08% of the service. That fact, together with the desire for simplication of the cost studies also explains why this plaintiff, and carriers generally, have been willing to consider the space authorized as being equivalent to the space used.

Obviously therefore, to the extent that the use of space authorized as the space used may represent any element of doubt, that doubt is one which inures to the advantage of the Government, and cannot fairly be inverted as a factor or circumstance to discount the result of the cost study.

On page 8 the defendant represents that "in these compilations, space authorized for mail service was treated as space used although not actually used, whereas baggage and express were charged only with space actually used".

This is another statement of the same nature as the one referred to herein immediately preceding, and is mistaken for the same reason. Suffice it to point out that the practice of counting the space "authorized", or requisitioned by the Post Office Department, as being equivalent to the

amount of space used, would certainly not have been agreed to by the Post Office Department and approved by the Commission for the cost studies in all previous cases, had it been either unreasonable or unfair to the government. Why it is fair and reasonable to the government in respect to 3-foot closed pouch service has already been explained. In respect to space taken for travelling post offices that the space must be restricted to the exclusive use of the post office, hence shut off from the rest of the car by partitions. In that space the government can to the limit of its cubic capacity transport as much or as little mail matter as the Post Office Department itself may choose. Consequently it is in fact space devoted to that use exclusively, even though the volume carried while in such exclusive use is, at times, less than the volume which could be therein carried within its maximum cubical capacity.

The defendant represents on page 9 that the Commission "held that the cost study was not considered to be an accurate ascertainment of the actual cost of the service, but only an approximation to be given appropriate weight considering all the circumstances, and adverted to various other factors which it deemed were controlling". However that was, it is respectfully submitted, merely an unsupported generalization which cannot suffice to make lawful and proper capricious and arbitrary decisions.

Terming the cost study in the present case an "approximation" does not seem to have been expressed in just that way in other cases, for the language in previous decisions has been that "the cost study furnished a sufficiently reliable basis" or a "substantial basis", for conclusions as to the reasonableness of mail pay rates.

The three terms are not greatly different, however, and the word "approximate" has been defined by the courts. In *Ross v. Keaton Tire, Etc., Co.* (1922) 57 Cal. App. 50, in which there was involved a promise to pay rent at the

rate of 8 per cent on cost of a building to be erected and "to cost approximately $21,000.00", the Court held that the actual cost of $31,857.00 was not approximately $21,000.00. The Court said "The word 'approximate' is defined 'to come close to' as in quality, degree, of quantity; approach closely without coinciding with exactly', or reaching the specified amount or quantity. (*Bloomington Canning Co.* v. *Union Can Co.*, 94 Ill. App. 62).".

In *City of Richmond* v. *I. J. Smith & Co.*, 89 S. E. 1923, 119 Va. 198, involving the excavation of bridge foundations to bed rock, the depth of which was given as "approximate", the Court said, "when therefore, the line of bed-rock was given as 'approximate', it was intended to express the idea that the line as shown upon the profile was nearly, but not exactly, correct. See Webster's International Dic.".

In *Worcester Post Co.* v. *W. H. Parsons Co.*, 265 Fed. 591, it was held that a contract for sale and delivery of "approximately" 45 tons per month did not permit of any substantial variation or departure from that number without consent.

The District Court had before it that explanation given by Division 5, as well as that of the Commission in its decision of Feb. 4, 1936, and, after listening to oral argument, stated its opinion as follows:

> "Neither applicant nor this Court entertains the view that the hypothetical cost is 'necessarily conclusive'. It is merely the fairest method that has been devised. If 'actual cost' as to each item be required, applicants would be helpless and the Commission would be reduced to guessing." (Appendix , p.),

To similar effect the Court of Claims stated:

> "The trouble with this argument is that a deficit in net railway operating income from mail is always necessarily 'Computed'. *Actual* loss or *actual* deficit in such income is an ignis fatuus." (R. 42)

"We thus see that ascertainment of 'actual' as applied to plaintiffs' cost in the transportation of the mail, had no prospect of realization. The cost had to be a 'computed' cost in any event." (R. 43)

"Here, however, it is found that 'there is no evidence which indicates that plaintiffs' operating costs were excessive in relation to the character of the road and the traffic area or that such costs were increased by inefficiency, negligence, or uneconomical management of operation by the plaintiffs'."

"Nowhere in the Commission's findings or conclusions in plaintiffs' case do we find an intimation that the so-called 'actual cost', whatever it might be, was anything but fair and reasonable." (R. 43)

"We are of the opinion that the 'approximation' should be given greater weight than the Commission affords it, because, as we have said, and the Commission in effect admits, there is no such thing as certainty in actual cost. 'Approximate, or as it is called, 'computed' cost must be relied upon, and as a matter of law must be decisive. There is no alternative, at least no satisfying alternative." (R. 47)

In any event, there was no practical necessity to establish the exact cost with precise mathematical exactitude. In *Baltimore & Ohio et al. v. United States*, decided May 18, 1936 (298 U.S. 351), a case involving the divisions of joint rates under an order of the Commission, where the issue of confiscation was raised, the Supreme Court of the United States said:

"The burden of appellants, heavy though it is, does not require them to prove with arithmetical accuracy the cost of the transportation covered by the challenged divisions or the value of the property used to perform it, or the proportion attributable to that service. It is enough if the evidence preponderating in their favor reasonably warrants findings sufficient to support the decree sought. Many issues as to which demonstrable accuracy is impossible have to be decided by the courts. In ascertaining cost of transportation of one out of many commodities hauled by railroads, it is impossible to attain precision. Mere lack of it is not ground for

objection, either to the evidence offered of the facts which it tends to prove."

On page 10 the defendant cites as other "factors" to justify the Commission's disregard of the result of the cost study, that "the Commission found that (1) mail with relation to the other services is bearing its fair share of the expenses of operation and is contributing relatively more than the other services for the space furnished"; that (2) mail revenues have been relatively more stable than from other passenger train services"; and that (3) the actual use of the closed pouch mail units was considerably below their maximum capacity. Therefore, the defendant argues, the Commission concluded in its first report, for those reasons, and the further fact that the applicant receives the same rates as those received by other roads for the units of service, many of them being in much the same situation as the applicant in respect of passenger-train operations, "the data submitted fail to justify giving the applicant rates higher than those now paid other railway common carriers for like service".

First it is to be observed that here, as elsewhere, the defendant goes back to statements made by the Commission in an effort to exculpate itself, without paying any respect to the special findings of fact by the lower Court on the same evidence that was before the Commission, together with all these same "reasons" put forward by the Commission.

(1) In any event the plaintiff respectfully submits that the lack of merit in these "factors" as justification for disregard of the cost study, is manifest in the fact that the very object of the cost study, upon principles which the Commission had always approved theretofore, was to separate the passenger and freight services; and then to segregate the respective passenger services into separate and distinct "compartments", so that there could be no confusion of thought to becloud the question as to what rate